

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

5 B-WAY CORPORATION

Employer

and Case No. 5–RC–15840

10 INTERNATIONAL ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, DISTRICT 98, AFL-CIO

Petitioner

15 *Stephanie Cotilla, Esq.*, of Baltimore, MD, for the Regional Director.
Michael S. Glassman, Esq., of Cincinnati, OH, for the Employer.
David Porter, of Cincinnati, OH, for the Petitioner.

20 Decision

Statement of the Case

25 *David L. Evans, Administrative Law Judge.* The hearing in this matter under the National
Labor Relations Act (the Act) was held before me in Baltimore, Maryland, on July 14, 2005.¹ On
March 7, in Case 5–RC–15840, International Association of Machinists and Aerospace Workers,
District 98, AFL-CIO (the Petitioner or the Union), filed a petition seeking an election pursuant
30 to which it could become certified by the National Labor Relations Board (the Board) as the
collective-bargaining representative of the York, Pennsylvania, production and maintenance
employees of B-Way Corporation (the Employer). On March 15, the Regional Director approved
a stipulated agreement that called for a Board election on April 13 and 14. The tally of ballots for
that election reflected that, of approximately 118 eligible voters, 44 votes were cast for
representation by the Union and 65 votes were cast against such representation. (There were no
35 challenged ballots.) On April 18, the Union timely filed 6 objections to alleged Employer
conduct that affected the results of the election. Thereafter, the Union withdrew all but one of
those objections. On July 1, the Regional Director issued a Report on Objections that ordered a
hearing on the remaining objection before a Board administrative law judge. At the hearing, the
parties made oral arguments which I have carefully considered. Based on the entire record and
40 my observations of the demeanor of the witnesses, I make the following findings and
conclusions.

The Objection

¹ All dates mentioned are in 2005, unless otherwise indicated.

5 The objection, as filed and as amplified at the hearing, is that the Employer, within the critical period,² announced and granted employee bonuses that were unprecedented in timing and amounts. The Employer denies that it granted any bonuses during the critical period, but it concedes that it did, within 2 days before the election, announce that monetary distributions would be made for all non-management plant personnel (including production and maintenance unit employees, employees who were not part of the unit, and supervisors who do not participate in a management profit-sharing program). The Employer contends, however, that both the timing of the announcement and the amounts of the distributions (which were made after the election) were required by its Gainsharing Plan that had been in effect for many years.

² Only conduct that occurs between the filing of the petition and the date of the election may be considered as grounds for setting aside a Board election. *Ideal Electric Co. & Mfg.*, 134 NLRB 1275 (1961); *Goodyear Tire & Rubber Co.*, 138 NLRB 453 (1962).

Evidence presented by the Petitioner

5 Gary Huber testified that he has been a production employee at the Employer's main plant in York for 11 years and that he could recall receiving only 5 Gainsharing Plan distributions over that period, including one that was announced during the day before the day of the instant hearing. Huber testified that his prior distributions had usually been for less than \$100, but the distribution that he received after an April 11 employer posting was at least twice as much as any that he had received before. Huber identified as the Employer posting of April 11:

10 All Employees

Gainsharing Distribution

15 We are very pleased to announce that for the 2nd straight quarter the York plant has achieved a gainsharing distribution. Your hard work and effort to improved productivity and reducing spoilage has resulted in this achievement. In our last quarter we distributed a total of \$14,900 and this quarter ending 04/03/05 we earned \$43,800. Congratulations on a job well done.

The (printed) signature on the announcement was that of Jim Fiddler, the York plant manager.

20 Huber further testified that, within 2 hours of the April 11 posting, the Employer conducted an election campaign meeting at which supervisors argued against the employees' selecting the Union as their collective-bargaining representative. After the Employer's presentation, an employee stood up and made a "prepared" speech against the Union. Another employee made a shorter antiunion statement. After that, Rick Forti, a Company vice president, said that the meeting was closed, and he told the employees to check the notice on the bulletin board.

30 Huber further testified that the employees remarked among themselves that April 11 was an unusually early date in a quarter for an announcement to be made that there would be a distribution under the Gainsharing Plan. Huber testified that, according to his memory, it usually took about a month past a quarter's end for such announcements. Huber acknowledged that in previous quarters in which there was to be no Gainsharing Plan distributions, no announcement was made, although the monthly tables of figures for production and profitability were posted which would indicate whether a distribution should be expected by the employees. Huber identified a stub that reflected that his Gainsharing Plan distribution for the quarter that ended with the last quarter of calendar year 2004 was \$133.92. The stub is dated February 4, 2005. Huber testified that he could not recall when that distribution was announced, but he acknowledged that the employees did know that a distribution was coming before they received it.

40 On cross-examination, Huber acknowledged that the stub for his Gainsharing Plan distribution check that followed the April 11 announcement shows that his check for that distribution was dated April 28 (or 2 weeks after the election and 2 weeks after the critical period had expired). Huber further acknowledged that, according to his understanding, the individual Gainsharing Plan distributions were always in differing amounts among the employees because, as well as being based on plant production, the distributions were based on individual earnings for the previous quarter. (That is, after any quarter for which distributions were to be paid, higher-paid employees would receive greater amounts than lower-paid employees who had worked the same number of hours.) Huber further acknowledged that, at the inception of the Plan in 2001, the Employer conducted meetings to explain how the distributions were to be calculated. Huber further acknowledged that, historically, employees knew about Gainsharing Plan distributions "[f]airly shortly" after the close of each fiscal quarter.

55 Warehouse employee Ed Orth testified that, over the years, there were no announcements of when there were to be no distributions; monthly and quarterly charts were posted, and "you had go over and figure it out." Orth also acknowledged that he did not know or understand the Employer's formula for calculating Gainsharing Plan distributions.

Evidence presented by the Employer

Joseph Frabotta, whose office is in Cincinnati, is the Employer's corporate director of human resources. Frabotta testified that the Employer operates 10 facilities that manufacture metal containers and 9 that manufacture plastic containers. The York plant manufactures gallon and quart steel cans and components (tops, handles and such). The Gainsharing Plan was instituted in April 2001 for only the metal-container facilities such as York. According to Frabotta, the formula for the workings of the Gainsharing Plan has not been significantly changed since 2001, and it has not been changed at all since 2002.

Frabotta and Kenneth Stout, plant comptroller, gave testimony about the workings of the Gainsharing Plan. The Employer's fiscal quarters end on Sundays; the fiscal year begins on October 1 (or the closest Monday to October 1). Generally, sales and production projections for each plant are estimated in July for the Employer's next fiscal year. In 2 areas where the employees have at least some control, work-hours expended and product-spoilage (hours and spoilage), those annual projections assume certain ratios of expenses per unit of output. On a quarterly basis, if these expense levels are held below that which would have been expected for whatever the actual output level of production turns out to be (so that a "favorable variance" is created), and if the levels of savings exceed 0.5% of total personnel payroll for the quarter, one-half of the total savings is passed along to the plant personnel, including non-unit employees and supervisors who do not participate in a managers' incentive plan. The savings are not divided up equally (i.e., so many dollars in savings on hours and spoilage divided by x-number of personnel yields equal distributions for everybody). The distributions are weighted according to individual employees' earnings during the previous quarter. The percentage of total payroll that an individual employee's quarterly wages represents will determine what percentage of the corpus of any distributed savings that his or her Gainsharing Plan distribution will be.

Computations of the plant's savings on hours and spoilage are made monthly and quarterly. Tables that indicate the savings (or lack thereof) are posted monthly. After the ends of fiscal quarters in which there are no savings on expected hours and spoilage, only hours and spoilage amounts are published. In quarters that do have a such savings, an announcement of the savings, broken down by the hours and spoilage amounts, is posted.

Frabotta testified that plant comptrollers are required to have their computations for the Gainsharing Plan completed within 6 workdays after a quarter is closed. Those computations are reviewed "for corporate adjustments to whatever accounts or accruals that may be needed" by the 7th or 8th day of the following quarter, and the "corporate accounting group" then reviews all hours and spoilage figures and determines which plants will receive a payout under the Gainsharing Plan. Results of those reviews are posted immediately upon completion.

Frabotta identified a copy of an e-mail to him from the corporate accounting office, dated 11:51 a.m. on April 11. The text indicates that 3 of the Employer's 10 metal-container plants had "achieved a gainsharing payout" for the second fiscal quarter, which quarter had ended on April 3 (as indicated on the above-quoted notice). The plants were in Trenton, Garland, and York, and the "amounts to be distributed" among personnel at each plant were \$7,198.50, \$27,042.00 and \$43,881.00, respectively. Frabotta further identified an e-mail from himself on April 11, at 12:24 p.m. authorizing the final computations of individual distributions and telling the 3 plant managers to post notices "congratulating employees on a job well done."

Frabotta further identified an e-mail from the corporate accounting office dated January 12 which indicated that, for the Employer's first quarter of fiscal 2005 (the last calendar quarter of 2004) at the York plant there was a savings under the Gainsharing Plan at York of \$14,909. Stout identified the table that was posted for that quarter. As well as stating that the plant's "payout earned" was the \$14,909 figure, the posting also stated: "There will be a Gainsharing payout for the first quarter of fiscal year 2005."

Frabotta further identified a table that reflected that, since the Gainsharing Plan was introduced for the 10 metal-container plants during the third fiscal quarter of 2001, the York plant employees have also had distributed to them under the plan: (1) quarter 3, 2001, \$4,739;

(2) quarter 1, 2002, \$26,216; (3) quarter 2, 2003, \$17,251; (4) quarter 1, 2004, \$11,584; (5) quarter 1, 2005, \$14,909; and (6) quarter 2, 2005, \$43,881 (the last 2 of which were previously mentioned).

5 Frabotta further identified the stubs for the checks of Huber's individual distributions under the Gainsharing Plan for the first quarter of 2002 and for the second quarter of 2005. The former was issued on February 9, 2002, and was for \$379.00; the latter was issued on April 28, 2005, for \$451.09. Frabotta testified that, at the April 11 meeting, the antiunion employees who were mentioned by Huber just stood up and started talking. Frabotta denied that any member of
10 management stated that no one else could speak.

Findings and Conclusions

As stated by the Board in *Desert Aggregates*, 340 NLRB No. 38 (2003), the law is:

15 An employer's legal duty in deciding whether to grant a benefit during the critical period before an election is to act as it would have if the union were not present. *Red's Express*, 268 NLRB 1154, 1155 (1984). Thus, while the Board has inferred from the timing of such a grant of benefit that it was unlawful, the Respondent may rebut this inference by showing that the
20 timing of its action is explained by reasons other than the pending election. *B & D Plastics*, 302 NLRB 245 (1991); see also *DMI Distribution of Delaware*, 334 NLRB 409, 410 and fn. 9 (2001) (applying the same analysis to unfair labor practice cases as to objections cases); *Holly Farms Corp.*, 311 NLRB 273, 274 (1993). Even where an employer justifies the timing of such a benefit, however, the amount of the benefit may be unlawful. See, e.g., *Comcast Cablevision*, 313 NLRB 220, 248-250 (1993).
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Moreover, even if the timing and amount of a benefit grant are demonstrated to be lawful or non-objectionable, where there is an announcement of a benefit during the critical period, but there had been no announcements of similar benefit increases in the past, unlawful or objectionable
30 conduct will be held to have occurred. *Baker Brush Co.*, 233 NLRB 561 (1977). Where a grant is made during the critical period, the employer can meet its burden of showing that union considerations did not prompt the grant by showing that the benefit was part of an already established company policy and that the employer did not deviate from that policy upon the advent of the union. *American Sunroof Corp.*, 248 NLRB 748, 748-749 (1980), modified on
35 other grounds 667 F.2d 20 (6th Cir. 1981).

At the York plant, the corpus of the Gainsharing Plan distribution for the Employer's first fiscal quarter of 2005 was \$14,909, and the corpus for the second quarter was \$43,881. That is, the distribution that was announced on April 11 for the January-March, 2005, quarter, plant-
40 wide, was almost triple what the distribution for the October-December, 2004, quarter had been. Also to be noted is that, according to the records that it offered in evidence, the Employer employed 5 fewer personnel in the second quarter of 2005 than it did in the first (137 versus 142). Therefore, in raw terms, more dollars were distributed among fewer personnel (again, unit employees, non-unit employees and some management). Although a tripling of the distribution
45 appears suspicious, the Employer further demonstrated that, for 4 of the 14 previous quarters when the Gainsharing Plan was in effect,³ there were distributions which followed quarters that had had no distributions. (Those quarters were 2002-Q1, 2003-Q2, 2004-Q1, and 2005-Q1.) For those 4 quarters, of course, the plant-wide distributions were not just triple those of the quarters that had preceded them; they were infinitely greater. Therefore, nothing can be made of the fact
50 that the corpus that was distributed for 2005-Q2 was nearly triple that of 2005-Q1.

I fully appreciate that many of the figures that the Employer introduced to demonstrate the amount of savings on hours and spoilage during the first quarter of 2005 are not readily subject to scrutiny. The figures were, however, presented. There was no request for any underlying

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I, of course, do not include 2001-Q3, the first quarter of the program, because no effective comparison to its prior quarter would be possible.

documentation for the figures,⁴ and there is no dispute about their accuracy. Therefore, the Board must accept the Employer's testimony that, during the second quarter of its fiscal year 2005, the York plant made the substantial savings in hours and spoilage that, under a formula that has gone essentially unchanged since 2001, required the distribution that was announced on April 11.⁵

Huber testified that his individual distribution for the second quarter of 2005 was twice as great as any other that he had ever before received under the Gainsharing Plan. That testimony, however, was incorrect. The distribution that Huber received on April 28 was \$451.09; his second-best distribution was for the first quarter of 2002 in the amount of \$379.00. The \$72.09 difference represents a 19.0% increase, which is a great deal less than the 100% difference that Huber had remembered.

As well, the announcement itself, although it came within the critical period, does not appear to have been objectionable. The wording of the announcement does not expressly relate to the election, and there is no statement within it that can be reasonably construed to mean that the forthcoming distribution was somehow contingent on the outcome of the election. Moreover, the Employer demonstrated that the timing of the announcement corresponded with the announcement of distributions for the prior quarter. The Employer's first fiscal quarter of 2005 ended on January 2, and on January 12, 2005, the results were posted with the statement "There will be a Gainsharing payout for the first quarter of fiscal year 2005." (As noted in Huber's testimony, checks for that quarter were issued on February 4.) The second quarter ended on April 3, and the above-quoted announcement was made on April 11. The time lapses, if not precisely the same, are at least consistent. Moreover, although the April 11 announcement of a Gainsharing Plan distribution is more expansive than the previous quarter's announcement, there is no logic or authority that would require a word-for-word tracking. Finally, the first and second fiscal quarters of 2005 represented the first time that Gainsharing Plan distributions had been achieved in successive quarters at the York plant. This was a positive phenomenon that the Employer was not required to let pass without special notice.

Conclusion and Recommendation

Based on the above findings, and the entire record,⁶ I recommend that the objection before me be dismissed and that Case 5-RC-15840 be remanded to the Regional Director for Region 5 for the purpose of issuing the appropriate certification.⁷

Dated at Washington, D.C.

⁴ At least some of the underlying documentation was present in the courtroom; Frabotta was shown such in order to give the hours and spoilage figures for 2004-Q1.

⁵ Huber and Orth testified that management members had complained because efficiency was low, but they did not testify when those complaints were made. The Employer's figures indicate that efficiency was comparatively low in February but improved in March. Management complaints during March about the February inefficiencies may well have contributed to the improvement.

⁶ For possible purposes of review, I here state that I credit Frabotta's account of the April 11 employee meeting.

⁷ Any party may, within fourteen (14) days from the date of issuance of this recommended Decision, file with the Board in Washington, D.C., an original and eight (8) copies of exceptions thereto. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof on the other party and shall file a copy with the Regional Director of Region 5. If no exceptions are filed, the Board will adopt the recommendation set forth herein.